Filed 3/8/19 P. v. Lashley CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MARCEL LAWRENCE LASHLEY,<br><br>Defendant and Appellant. | B278472<br><br>Los Angeles County<br>Super. Ct. No. MA065425 |

APPEAL from a judgment of the Superior Court of Los Angeles County, Joel L. Lofton, Judge. Affirmed in part, reversed in part, and remanded with directions.

Renée Paradis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Defendant Marcel Lawrence Lashley was convicted of mayhem and assault after attacking another man and biting his face. Defendant contends that his mayhem conviction is not supported by substantial evidence because there is insufficient evidence the victim's scar was permanent, that his prior burglary conviction is not a strike because the Illinois theft statute is broader than California's, and that we should remand to permit the trial court to exercise its newly-acquired discretion to strike his serious-felony prior. Because the Illinois crime of burglary to commit theft does not require specific intent to permanently deprive, we conclude there is insufficient evidence defendant suffered a prior strike. We therefore reverse the court's ruling on that point and remand with directions.[1]

## PROCEDURAL BACKGROUND

By information dated March 20, 2015, defendant was charged with mayhem (Pen. Code,[2] § 203; count 1), assault with force likely to cause great bodily injury (§ 245, subd. (a)(4); count 2); battery (§ 242; count 3); and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a); count 4).[3] As to count 2, the information alleged defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)). The information also alleged that defendant had been convicted of two

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[1] As such, we do not address defendant's argument that resentencing is required under Senate Bill No. 1393. (Stats. 2018, ch. 1013, §§ 1–2.)

[2] All undesignated statutory references are to the Penal Code.

[3] The prosecution later dismissed count 4.

prior felonies in Illinois, which constituted strike priors (§ 667, subds. (b)–(i); § 1170.12, subds. (a)–(d)) and serious-felony priors (§ 667, subd. (a)(1)). Defendant pled not guilty and denied the allegations.

After a bifurcated trial at which he did not testify, a jury convicted defendant of counts 1 and 2, found the great-bodily-injury allegation true, and acquitted him of count 3 and its lesser-included offense.[4] Defendant waived a jury trial on the prior-conviction allegations. After a court trial, the court found that defendant's burglary prior was a strike under California law, but his conviction for aggravated discharge of a firearm was not.

The court denied defendant's motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, and sentenced him to an aggregate term of nine years in state prison. The court selected count 1 (§ 203; mayhem) as the base term and imposed nine years—the low term of two years, doubled for the strike prior, plus five years for the serious-felony prior (§ 667, subd. (a)(1)), to run consecutively. The court imposed four years for count 2—the low term of two years, doubled for the strike prior—but stayed execution of the sentence under section 654.

Defendant filed a timely notice of appeal.

## FACTUAL BACKGROUND

Around 5:10 p.m. on February 22, 2015, Ralph Saunders stepped outside the homeless shelter where he'd been staying in Lancaster to smoke a cigarette. Defendant was nearby, using a picnic table to steady himself.

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[4] Count 3 involved a different victim, Matthew Kuper.

Saunders asked defendant if he needed help. In response, defendant jumped on Saunders, grabbed him by the throat, and bit his face along the left jaw, nearly severing his cheek. Saunders was taken by ambulance to a nearby hospital, where he received five stitches.

At trial over a year later, Saunders still had a "nasty scar" and numbness in that area of his face. He was self-conscious about the scar, so when his job allowed him to, he grew a beard to hide it. In addition to viewing photographs of the scar, the jurors could see the scar in person when Saunders walked directly in front of them.

## DISCUSSION

Defendant contends that his mayhem conviction is not supported by substantial evidence, that his Illinois burglary conviction is not a strike in California, and that we should remand to permit the court to exercise its newly-acquired discretion to strike his serious-felony prior under Senate Bill No. 1393.

### 1. There is substantial evidence of mayhem.

Defendant contends there is insufficient evidence to support his mayhem conviction because the prosecution did not prove Saunders's scar was permanent. We disagree.

#### 1.1. Standard of Review

In assessing the sufficiency of the evidence, we review the entire record to determine whether *any* rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "The record must disclose substantial evidence to support the verdict—i.e.,

evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Ibid*.)

In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may not reweigh the evidence or resolve evidentiary conflicts. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) The same standard applies where the conviction rests primarily on circumstantial evidence. (*People v. Thompson* (2010) 49 Cal.4th 79, 113.) In short, we may not reverse a conviction for insufficient evidence unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [it].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

**1.2. Elements of Mayhem**

Under section 203, a defendant commits simple mayhem when he "unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip … ."

If mayhem is based on a disfiguring injury, the injury must be permanent. (*People v. Santana* (2013) 56 Cal.4th 999, 1007; see *id.* at p. 1004 [" ' "the modern rationale of the crime may be said to be the preservation of the natural completeness and normal appearance of the human face and body … ." ' "].) The prosecution need not prove that the disfigurement is serious or that the wound required extensive suturing, however. (*Id.* at p. 1010.) Indeed, a disfiguring injury may be considered

permanent notwithstanding the feasibility of cosmetic repair. (*Id.* at p. 1007.)

Here, jurors could see Saunders's scar firsthand over a year after defendant bit him. Saunders testified that his face still felt numb in the area, and that he grew a beard to hid the scar. The jurors were entitled to infer from this evidence—and from their personal experience with scarring—that the scar was permanent. No medical testimony was required.

**2. There is insufficient evidence defendant's prior Illinois conviction for burglary is a strike under California law.**

Defendant contends there is insufficient evidence his prior Illinois conviction for burglary constitutes a serious felony in California. We agree.

**2.1. Legal Principles and Standard of Review**

"For criminal sentencing purposes in this state, the term 'serious felony' is a term of art. Severe consequences can follow if a criminal offender, presently convicted of a felony, is found to have suffered a prior conviction for a serious felony." (*People v. Warner* (2006) 39 Cal.4th 548, 552 (*Warner*).) If the present conviction is also for a serious felony, "the offender is subject to a five-year enhancement term to be served consecutively to the regular sentence." (*Ibid.*) A prior serious-felony conviction also "renders the offender subject to the more severe sentencing provisions of the three strikes law." (*Ibid.*) Whether a crime qualifies as a serious felony is determined by section 1192.7, subdivision (c), which lists and describes dozens of qualifying crimes, including murder, burglary, kidnapping, and forcible sexual assault. (§ 667, subd. (a)(4); § 1170.12, subd. (b)(1).)

"Under our sentencing laws, foreign convictions may qualify as serious felonies, with all the attendant consequences for sentencing, if they satisfy certain conditions. For a prior felony conviction from another jurisdiction to support a serious-felony sentence enhancement, the out-of-state crime must 'include[ ] all the elements of any serious felony' in California. (§ 667, subd. (a)(1).) For an out-of-state conviction to render a criminal offender eligible for sentencing under the three strikes law [citations], the foreign crime (1) must be such that, 'if committed in California, [it would be] punishable by imprisonment in the state prison' [citations], and (2) must 'include[ ] all of the elements of the particular felony as defined in' section 1192.7(c) [citations]." (*Warner*, *supra*, 39 Cal.4th at pp. 552–553.)[5]

The People must prove all elements of an alleged sentence enhancement beyond a reasonable doubt—including the serious or violent nature of a prior conviction. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 262 (*Rodriguez*).) When the record does not disclose the facts of an out-of-state prior, we presume the "prior conviction was for the least offense punishable under the foreign law." (*People v. Guerrero* (1988) 44 Cal.3d 343, 352.) If the prosecution only offers the abstract of judgment, such evidence proves nothing more than the least-adjudicated elements of the prior offense. (*Rodriguez*, at p. 262.)

Under the "least adjudicated elements" test, "only the foreign jurisdiction's statutory or common law definition of the

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[5] A criminal offender may also be sentenced under the Three Strikes law if he or she has a prior conviction for a violent felony as defined in section 667.5, subdivision (c). (§ 667, subd. (d)(2); § 1170.12, subd. (b)(2).)

offense may be considered to determine if the offense would be a serious felony in California. Only the elements of the offense which must be proved to sustain a conviction of the offense are considered in deciding if the offense 'includes all of the elements of the particular felony as defined under California law.' " (*People v. Myers* (1993) 5 Cal.4th 1193, 1199.)

If, upon analysis of the elements of the predicate offense, we determine that the prior conviction could have been based on acts *not* specified in section 1192.7, subdivision (c), then, as a matter of the sufficiency of the evidence, the least-punishable offense was not a serious felony, and the prior conviction may not be used to impose a sentence under the Three Strikes law. (*Rodriguez*, *supra*, 17 Cal.4th at pp. 261–262.)

In this case, the People established that defendant pled guilty to one count of "residential burglary in that he knowingly [and] without authority entered the dwelling place of Michael Jones with the intent to commit therein a theft" in violation of chapter 720, section 5/19-3 of the Illinois Compiled Statutes. On this record, therefore, we know nothing about the nature of the conviction beyond its statutory requirements and the fact that defendant's underlying intent was to commit some form of theft. (*People v. Avery* (2002) 27 Cal.4th 49, 53 (*Avery*).) If the conviction qualifies as serious, it is under section 1192.7, subdivision (c)(18), which provides that "any burglary of the first degree" is a serious felony. Thus, the question is whether an Illinois conviction for "residential burglary … with the intent to commit therein a theft" necessarily involves conduct that would

qualify as " 'any burglary of the first degree' " under California law. (*Avery*, at p. 53, fn. 3.)[6]

"In California, burglary requires 'the intent to commit grand or petit larceny or any felony.' (§ 459.)" (*Avery*, *supra*, 27 Cal.4th at p. 53.) Here, the record shows that defendant's Illinois conviction involved the intent to commit "theft," which would appear to satisfy the California intent requirement. (*Ibid.*) Defendant argues, however, that the difference between the statutes lies not in the Illinois definition of burglary but in its definition of theft, because the statutory elements of theft in Illinois are different—or at least appear different—than the elements in California. That is, theft in Illinois is not necessarily theft in California. And if it is possible to intend theft under Illinois law but not under California law, then the Illinois conviction would not necessarily be burglary in California. (*Id.* at pp. 53–54.)

**2.2. Elements of Theft in California and Illinois**

Defendant contends that the Illinois definition of theft includes the offense of receiving stolen property, whereas California's definition of theft, as stated in section 484, does not. (See 720 ILSC 5/16-1, subd. (a)(4).)[7] He argues this difference

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[6] As relevant here, "[e]very burglary of an inhabited dwelling house" is first degree burglary in California. (§ 460, subd. (a).)

[7] 720 ILCS 5/16-1, subdivision (a)(4), provides in pertinent part: "A person commits theft when he or she knowingly: [¶] … [¶] Obtains control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him or her to believe that the property was stolen[.]" Theft is a felony in Illinois if the stolen property is worth $500 or more. (*Id.*, subds. (b)(1)–(4).)

means that the Illinois theft statute is broader than the California statute, and, based on the nature of the underlying theft offense, a person can commit residential burglary in Illinois without committing the same offense in California. The People contend, notwithstanding their admitted inability to find any pertinent case authority on this subject, that defendant's claim is "specious," "legally inaccurate," and "completely unsupported." We need not decide whether taking already-stolen property worth less than $950 constitutes theft in California—and therefore, whether entering a residence with the intent to take already-stolen property worth less than $950 constitutes burglary—because there is a more fundamental problem with the Illinois theft statute: It is missing the mental state required in California.[8]

"California courts have long held that theft by larceny requires the intent to *permanently* deprive the owner of possession of the property. [Citation.]" (*Avery*, *supra*, 27 Cal.4th at p. 54.) But this mental state is not necessarily required to commit theft in Illinois.

In Illinois, theft is a single offense that a defendant can commit in a variety of ways, with each requiring proof of different elements. (720 ILCS 5/16-1.) Subdivisions (a)(1) through (a)(5) describe various acts—five ways in which a defendant may obtain unauthorized control of property. Subsections (A), (B), and (C), in turn, describe either a required mental state *or* conduct from

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[8] The Illinois statute also lacks California's asportation requirement. (See Decker, Illinois Criminal Law: A Survey of Crimes and Defenses (2018) § 11.02[f].)

which the perpetrator's mental state is presumed.[9] To convict a defendant of theft, the prosecutor must establish one item from each category. That is, they must prove the defendant committed one of the acts listed in subdivisions (a)(1) through (a)(5), *and* prove one of the mental states (or mental-state substitutes) listed in subsections (A) through (C).

A defendant is guilty of theft under a subsection (A) theory if he "[i]ntends to deprive the owner permanently of the use of benefit of the property[.]" (720 ILCS 5/16-1, (A).) If that were the only permissible mental state, the statutory elements would presumably be sufficient to establish the required intent in California, but it is not. A defendant may instead be guilty under subsection (B) (if he "[k]nowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit") or subsection (C) (if he "[u]ses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit"). These subsections are not functionally equivalent.

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[9] The statutory structure is confusing, and although we may not look beyond the statutory elements of the offense (*People v. Myers*, *supra*, 5 Cal.4th at p. 1199), there does not seem to be any prohibition on looking to foreign caselaw to determine what the elements *are*. On the statute's face, (A), (B), and (C) are listed as subsections of subdivision (a)(5). If we were construing a California statute, we would apply the subsections *only* to subdivision (a)(5). It is clear from Illinois caselaw, however, that these subsections *also* apply to the other forms of theft listed in subdivision (a). (See, e.g., *People v. Haissig* (Ill. Ct.App. 2012) 976 N.E.2d 1121.) Thus, a defendant in Illinois may be charged with committing theft under, e.g., subdivision (a)(2)(C), in which subdivision (a)(2) denotes the prohibited act and (C) denotes the required mental state or mental-state substitute.

Subsection (A) is a mental state that exists *at the moment* the defendant obtains control over the taken property. Subsections (B) and (C), on the other hand, are *actions* that the defendant completes *after* he obtains control over the taken property. Indeed, those subsections *only* address the defendant's actions; there is no requirement that the defendant intends those actions when he initially takes the property. Accordingly, a properly-instructed Illinois jury may be asked not to determine a defendant's specific intent when he acted, but instead to decide what he did with the property after he took it. Because the Illinois statute does not require the prosecution to prove specific intent while the California statute does, we conclude a defendant can commit theft in Illinois without committing theft in California.

As discussed, in California, burglary requires that the defendant act with the "intent to commit grand or petit larceny or any felony … ." (§ 459.) Because it is possible to commit theft in Illinois without committing theft in California, it must likewise be possible to *intend* theft in Illinois without intending it in California—and if the defendant enters a dwelling without the intent to commit a crime California recognizes as theft, he has not committed burglary. (*Avery*, *supra*, 27 Cal.4th at pp. 53–54.)

Here, the record of conviction does not reveal which version of the Illinois theft statute was implicated when defendant pled guilty to burglary. Nor does it contain any factual admissions by defendant that he intended to permanently deprive the victim of his property.[10] As such, the court should have presumed that

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[10] Nor does the record establish that defendant intended to commit a felony rather than a misdemeanor.

defendant's burglary conviction was for the least-adjudicated Illinois offense—conduct that would not constitute burglary in California. On this record, the prosecution did not prove defendant had been convicted of a serious felony.

Since double jeopardy principles do not prohibit retrial on the prior-conviction allegation (*People v. Monge* (1997) 16 Cal.4th 826), remand for this limited purpose is the appropriate remedy. (*People v. Jones* (1999) 75 Cal.App.4th 616, 635.)

## DISPOSITION

The court's true finding on the prior-conviction allegation is reversed. The matter is remanded for retrial, or for resentencing in the event the prosecution does not prove defendant's prior Illinois conviction for burglary constitutes a strike under California law. In all other respects, we affirm.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.